No. 2542

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAM YICK AND YUNG KIM ALIAS JUNG CHUNG,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

ALBERT SCHOONOVER,
United States Attorney.

ROBERT O'CONNOR,
Assistant United States Attorney.

CLYDE MOODY,
Assistant United States Attorney.
Counsel for Defendant in Error.

No. 2542

UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAM YICK AND YUNG KIM
ALIAS JUNG CHUNG,
Plaintiffs in Error.

vs.

THE UNITED STATES OF
AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

There are three assignments of error relied upon by plaintiffs in error in their brief for a reversal of the judgment of the trial court. The first assignment

relates to the giving of an instruction to the jury by the trial court. The second assignment of error alleges as error the refusal of the trial court to order a return of certain papers taken from the store of one of the defendants by the sheriff of Kern County under a writ of attachment, and offered by the Government on the trial of the case, no demand having been made for the return of the papers prior to the trial. The third assignment of error relates to objections to the introduction by the Government of the letters which were made the subject of the second assignment of error, the third assignment of error, however, being based upon alleged incompetency of the letters.

FIRST ASSIGNMENT OF ERROR.

The order of these assignments seems to be somewhat reversed, but we present them in the order in which they are presented in the brief of plaintiffs in error.

In this connection we desire to call the court's attention to the fact that the first assignment of error of plaintiffs in error should be disregarded for the reason that the exceptions to the instructions of the trial court were not properly taken and preserved. The bill of exceptions shows that the only exception taken to the instructions of the court was a general exception to each and every one of the instructions as given by the court (Tr. p. 227), and the rule of law of course is very well settled that a general exception of that kind to instructions given will not be considered by an appellate court.

In order that exceptions to instructions of the court as given can be considered by the appellate court, it must appear from the transcript on appeal that the particular exception to the particular instruction as given was called to the trial court's attention before the retirement of the jury from the box, and it must also appear that the grounds of the exception were called to the trial court's attention. As stated by the Circuit Court of Appeals of the 8th Circuit in the case of Price vs. Pankhurst, 53 Fed. 312, this rule of law is for the purpose of giving the trial court an opportunity to correct any mistakes inadverdently made in the charging of the jury. As heretofore stated, the transcript in this case affirmatively shows that no such action was taken by the plaintiffs in error in this case. It does not appear from the transcript that the trial court's attention was particularly called to the grounds of the objection to the particular instruction complained of as the first assignment of error of plaintiffs in error, and, as a matter of fact, it was not done, as is shown by the transcript on page 227, wherein it is said as follows:

> "The court thereupon gave and read to the jury the instructions hereinafter immediately set forth, to the giving of each and every one of which instructions the defendants and each of them duly excepted."

The above quotation is taken from the bill of exceptions and clearly shows that the only exception preserved by plaintiffs in error was a general exception to the giving of each and every one of the

instructions without advising the trial court of any particular instruction to which they excepted or of any particular ground upon which they excepted to any particular instruction.

It might be mentioned in passing that while the bill of exceptions shows certain instructions requested by the defendants, or plaintiffs in error, and refused by the court, plaintiffs in error have evidently abandoned the same, as no mention is made of them in their brief. However, the transcript, page 219, shows that the only exception taken to the refusal of the court to give said instructions was also a general ~~instruction~~ exception, in words as follows:

> "Thereupon the defendants requested the court to give to the jury the instructions hereinafter immediately set out, which request was by the court refused, as to each and every one of said instructions, to each and every one of which refusals the defendants and each of them duly excepted."

It is respectfully submitted that under the case of Holder vs. United States, 150 U. S. 91, decided by the Supreme Court of the United States, the failure of the defendants or plaintiffs in error to call the trial court's attention specifically to the grounds of objection to the particular instruction as given precludes the appellate court from considering such exception upon appeal and that the trial court is without power to relax the rule.

In the case of Holder vs. United States, 150 U. S. 91, Chief Justice Fuller, writing the opinion of

the court, said, in part:

> "There is no pretense that the charge of the court, occupying twenty-four pages of the printed record, was erroneous in every part, and no objection to any particular part is shown. The rule is that a general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review. Burton v. West Jersey Ferry Co., 114 U. S. 474; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 488; Lewis v. Unitel States, 146 U. S. 370."

It will be noted that the exception as preserved in the bill of exceptions and quoted above on page 227 of the transcript is that "to the giving of each and every one of the instructions, defendants and each of them duly excepted." This identical exception was passed upon by the Circuit Court of Appeals of the 8th Circuit in the case of Baggs vs. Martin, et al, 108 Fed. 33, wherein that court said, in part, as follows:

> "The first three errors assigned relate to instructions given and refused. But these alleged errors cannot be considered, because no sufficient exception was taken to the instructions given, or to the refusal to give those asked by the defendant. To a series of instructions, embracing several separate and distinct propositions, asked by the plaintiff and given by the court, only one of which is assigned for error or claimed to be erroneous, the only exception taken was: 'To the giving of the instructions

asked by the plaintiffs, and to each and every thereof, defendant then and there duly excepted.' To a series of instructions, embracing nine separate and distinct propositions, asked by the defendant and refused by the court, the only exception taken was in these words: 'To the refusing of which instructions defendant by his counsel duly excepted.' These exceptions were not sufficient, for reasons so often stated by this and other courts as not to require repetition. Railway Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Price v. Pankhurst, 10 U. S. App. 497, 53 Fed. 312; Association v. Lyman, 60 Fed. 498. In the last case cited, an exception in this form, 'To the giving of each and all of which instructions the defendant, by its counsel, then and there excepted,' was held to be of no avail. Anthony v. Railroad Co., 132 U. S. 173; Railway Co. v. Johnson, 54 Fed. 481; Philip Schneider Brewing Co. v. American Ice Machine Co., 77 Fed. 147; Shelp v. United States, 81 Fed. 700; Holder v. United States, 150 U. S. 91; Lewis v. United States, 146 U. S. 370; Iron Co. v. Blake, 144 U. S. 476.

The case of Ball vs. United States, 147 Fed. 32, decided by this court, is also in point; in that case, before Justices Gilbert, Ross and District Judge Hawley, in an opinion by Justice Gilbert, it was said in part, reading from page 43:

"We think that the most that can be said against the instruction is that it is open to the objection that a portion of it assumes the existence of evidence which is not in the record, evi-

dence that the deceased at the time when he was shot was attempting to retreat through the door, but the objection was not confined to that part of the charge. It was directed to an entire paragraph, portions of which were not subject to objection, and it did not point out the defective portion, so as to bring it to the attention of the court, and thus afford an opportunity to remedy it. Such an exception will not be considered in an appellate court. Cass Co. v. Gibson, 107 Fed. 363; Columbus Construction Co. v. Crane, 98 Fed. 946; Railroad Co. v. Varnell, 98 U. S. 479, 25 L. Ed. 233; Mobile and Montgomery R. Co. v. Jurey, 111 U. S. 584; Newport News and Miss. Valley Co., v. Pace, 158 U. S. 36, 39 L. Ed. 887."

It has been held by the Circuit Court of Appeals for the 8th Circuit in Price vs. Pankhurst, 53 Fed. 312, in construing Rule 10 of that court, which is identical with Rule 10 of the rules of this court, in part, as follows:

" 'The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.' Rule 10, 47 Fed. Rep. vi. 1 C. C. A. xiv.

"This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the judge may be willing to consent to such a bill. *He cannot waive the rule, so far as it relates to specific exceptions, if he desires to do so. The rule is not made for the judge's personal protection or benefit, but for the protection of suitors and the advancement of justice.* It is the duty of the party excepting, to call the attention of the court distinctly to the parts of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice which it has been intimated at the bar sometimes obtains of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. *The rule is mandatory. Its enforcement does not rest in the discretion of the lower court.* Its enforcement is essential to the proper and intelligent administration of justice. It serves to correct hasty, inaccurate, or misleading expressions in the charge; it affords an opportunity for explanations and qualifications which might otherwise be overlooked, and sometimes, by removing the ground of exception, prevents further litigation. It is, of course,

> the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards. There being no error on the face of the record, and no error saved by the bill of exceptions, the judgment of the circuit court is affirmed."

To the same effect are the following cases:

> Burton v. West Jersey Ferry Co., 114 U. S. 474;
> Hinchman v. First National Bank, 112 Fed. 391;
> St. Louis I. M. & S. Ry. Co. v. Spencer, 71 Fed. 93;
> Anthony v. Railway Co., 132 U. S. 173;
> Shelp v. United States, 81 Fed. 700;
> Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584.

M'Cendon v. U. S., 229 Fed. 523.

In fact, as was said by this court, in the case of Western Union Tel Co. v. Baker, 85 Fed. 690, in an opinion by Circuit Judge Gilbert, passing upon the same matter:

> "That position is sustained, we believe, by every court to which the question has been presented," citing numerous cases.

It is therefore respectfully submitted that for the

reasons above stated this court is precluded from considering the first assignment of error of plaintiffs in error.

There was, however, no error in the instruction complained of, and if this court should feel that it should examine into that question, we submit herewith points and authorities in support of the instruction as given to the jury by the trial court.

It is very apparent from the statement of facts as set forth in the brief of plaintiffs in error that counsel for plaintiffs in error have diligently endeavored to present a statement of facts which would fall within the purview of the rule as laid down in the case of Woo Wai vs. United States, 223 Fed. 412. So intently were counsel bent upon this task that they no doubt inadvertently overlooked some of the testimony which we present here in the nature of a correction and addition to the statement of facts as presented by the brief of plaintiffs in error.

On May 8, 1911, United States Immigration Inspector Morse met the defendant, Sam Yick, at Bakersfield, California, and had a conversation with him. During the course of that conversation, the defendant Sam Yick stated to the inspector, Morse, that if the inspector desired to make a good deal of money, the inspector could prepare papers for some Chinese that were in Mexico, so as to enable them to get to Bakersfield and that he, Sam Yick, would be able to give the inspector a good deal of business in that line. The inspector asked the defendant, Sam Yick, where the Chinese would come from and Sam Yick answered that he had friends in

Juarez, Mexico, that wanted to come to Bakersfield, and that he, Sam Yick, had letters from them in reference to coming to Bakersfield, and he wanted the inspector to prepare papers purporting to show that these Chinese in Mexico were native born citizens of the United States so that they would be enabled to pass the immigration inspectors on the way to Bakersfield (Tr. p. 46). Sam Yick further said that it would be easier to get the Chinese into the United States from Ensenada, Mexico, than from Juarez, and that if it looked good to the inspector, they could bring in a good many Chinese from Ensenada; that he knew of several Chinese that would come, and that he would pay $250 to the inspector for each Chinese so brought (Tr. p. 47).

Sam Yick also told Inspector Morse after the Chinese were arrested in San Diego that he had gotten two letters from Ensenada from Chinese that were anxious to come over, and that the Chinese in Ensenada had written that they did not have the money to put up themselves, but they had written him the names of some Chinese firms both in San Francisco and Fresno who would guarantee the money to Sam Yick (Tr. p. 69).

Inspector Morse testified (Tr. p. 83) that it was not a fact that from the very first conversation that he had with Sam Yick, he encouraged Sam Yick to pursue the proposition of bringing contraband Chinese into the country, and he further testified that he did not aid Sam Yick or Jung Kim in any way with a view of getting him to continue in developing the proposed course of bringing Chinese

into the country, and he further testified that whatever he did in the matter was done for the purpose of securing evidence of the fact that Sam Yick had, prior to that time, been engaged in the smuggling of Chinese (Tr. p. 83). He further testified (Tr. p. 87), that he was instructed by his superior officer not to take the initiative in any instance. He further testified (Tr. p. 88) that it was the defendant Sam Yick who suggested that the defendant Jung Kim act as a guide to bring the Chinese from Mexico.

It will also be noted from the transcript that this testimony of Inspector Morse is uncontradicted and undenied. It will also be noted from the transcript (pages 208 and 211) that although both defendants took the stand in their own behalf, there was absolutely no denial on the part of either one of them that the criminal intention to commit the offense had its origin in the mind of the defendant Sam Yick. Diggs vs. U. S., 220 Fed. 545. And Jung Kim actually did bring the Chinese into the United States as testified to by Edward P. Morse (Tr. p. 68).

At least three of the letters found in the possession of the defendant Sam Yick and introduced in evidence, to-wit, U. S. Exhibit 12J (Tr. p. 174), U. S. Exhibit 12L (Tr. p. 117), U. S. Exhibit 12K (Tr. p. 179), were written prior to the 8th day of May, 1911, the date on which Inspector Morse had his first conversation with Sam Yick, wherein the matter of smuggling Chinese was mentioned. A reading of these letters shows beyond peradventure of a doubt that the defendant Sam Yick was engaged

in the business of advancing letters of guarantee in order that Chinese in Mexico not lawfully entitled to enter the United States might be surreptitiously brought into the United States in violation of the immigration laws.

Therefore, upon these facts, it is respectfully submitted that the case at bar is easily distinguishable from the case of Woo Wai vs. United States, so strongly relied upon by plaintiffs in error. In the Woo Wai case, 223 Fed., reading from page 414, this court said:

> "The general rule in regard to entrapment is expressed in 12 Cyc. 160: 'The fact that a detective or other person suspected that the defendant was about to commit a crime and prepared for his detection as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design.' In the case at bar, there is *no evidence* that prior to the time when the defendant first approached Woo Wai, any of the defendants had ever been engaged in the unlawful importation of Chinese, or had ever committed or thought of committing any offense against the immigration laws. The purpose for which the detective was employed and the object of the scheme of entrapment, was not to punish men who were suspected of crime; but the whole purpose was to place Woo Wai in a position where he might be compelled to disclose facts of which he was suspected to have knowledge, knowledge not shown to be derived from unlawful acts of his own, but which related only to the unlawful acts of

other persons— —"

This court, in the same opinion, page 415, further said:

> "Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131. *But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. Thus in People v. Mills, it was the defendant who made the first suggestion looking toward the commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them.*"

As heretofore said, the evidence in this case being uncontradicted and undenied, that the first suggestion looking toward the commission of the criminal act came from the defendant Sam Yick, it will easily and readily be seen that this case falls within the doctrine laid down in the case of People vs. Mills, supra, and is distinguished from the Woo Wai case in the same manner that this court distinguished the Woo Wai case from the case of People vs. Mills.

The transcript fails to disclose any evidence to

the effect that the government officers incited or first suggested the commission of the offense, but, on the contrary, the transcript discloses that all of the evidence was to the opposite effect. We respectfully submit that under those circumstances, the instruction of the trial court was correct, and whatever participation the government officers took in the commission of the offense, the evidence discloses, was done solely for the purpose, as in the case of People vs. Mills, of securing evidence of a criminal intention that had its origin in the mind of the defendant.

In the case of People vs. Liphart, 105 Mich. 80, the court said:

> "We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. In cases of alleged larceny, where the master has directed a servant to deliver his property to a thief, or burglary, where he has directed the admission of the burglar, the principal element of the offense is lacking; in the former there is no felonious taking, in the latter no felonious breaking and entering."

Also, in the case of State vs. Waghalter, 177 Mo. 676, the court said:

> "While generally private persons cannot license crimes, and it is no palliation or excuse that a wrongdoer has anybody's permission, there are exceptions to this general rule, be-

cause there are certain acts which the law makes criminal when and because done without consent, the doing of which with consent is not legally reprehensible."

To the same effect are the following cases:

"We cannot agree with the reasoning of the Colorado court. It would be applicable to the commission of that class of crimes in which the want of consent of the owner of property to its taking or destruction was a necessary element of the offense. In such cases the owner of the property taken or destroyed might, by his conduct in employing a detective to entrap a person suspected of crime, destroy the element of want of consent to such taking or destruction of his property, and hence no crime would be committed by such taking or destruction. But can a man consent to an assault upon himself, and thereby free the perpretator of such an assault from legal responsibility? Can an officer consent to the commission of a crime and by so doing free the act of its criminal character? A private individual may be estopped in matters relating to his property by his own conduct. Is anyone else estopped by his conduct unless such other person is privy thereto? Has a public officer such property rights in his office and in the enforcement of the law as by his conduct or consent to be able to estop the state in a prosecution of crime? If so, whose liberty, property, character, or life would be safe? There can be but one answer to these questions, and that is emphatically 'No.' The statement of these propositions amounts to their demonstration, and we deem it unnecessary to

make any further argument or to cite authorities in support of our position, at least not until some reason is shown for a contrary view."

DeGraff v. State, 2 Okla. Cr. 519, 103 Pac. 538, 550. (On motion to strike out testimony of detective inducing sale intoxicating liquors contrary to law.)

* * * "The law alleged to have been violated was enacted for the benefit and protection of all the people, for the promotion and preservation of their health, sobriety, thrift, peace, and safety. It was not enacted in the special interest of the prosecuting officers, and a violation thereof is an offense, not against the prosecuting attorney, but against the state. Prosecutions for offenses of this character are in the interest of the public solely, and the prosecuting officer can neither repeal the law, pardon the offender, nor grant indulgences; nor can he lawfully give immunity except in those instances provided for by law. It is no less an offense to sell intoxicating liquor for any purpose to a sheriff or prosecuting attorney or to an agent or representative of either, than it is to sell to any one else; and a sale made to such officer or his agent, though solicited by him for the purpose of detecting the commission of the offense and of instituting a prosecution therefor, is punishable, and the officer's solicitation works no estoppel to a prosecution. The pith of the matter was well stated by Justice Vann in People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131, when he said: 'We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his pow-

ers and held out a bait. The courts do not look to see who held out the bait, but to see who took it.'

"We are aware that there are some decisions which apparently uphold the doctrine contended for by plaintiff in error; but the overwhelming weight of authority, and in our opinion all the reasoning, is on the other side, especially in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnished evidence of a course of conduct. See Onondaga County Com'rs v. Backus, 29 How. Prac. (N. Y.) 33; Tripp v. Flanigan, 10 R. I. 128; People v. Murphy, 93 Mich. 41, 52 N. W. 1042; People v. Liphardt, 105 Mich. 80, 62 N. W. 1022; People v. Everts, 112 Mich. 194, 70 N. W. 430; People v. Rush, 113 Mich. 539, 71 N. W. 863; City of Evanston v. Myers, 172 Ill. 266, 50 N. E. 204; State v. Jansen, 22 Kan. 498; State v. Stickney, 53 Kan. 308; 36 Pac. 714, 42 Am. St. Rep. 284; People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; United States v. Whittier, 5 Dill. 35, Fed. Cas. No. 16 688; Bates v. United States (C. C.), 10 Fed. 92, and note: United States v. Moore (D. C.), 19 Fed. 39; United States v. Dorsey (D. C.), 40 Fed. 752; Shepard v. United States, 160 Fed. 584, 87 C. C. A. 486; Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; Price v. United States, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727. In many instances habitual and flagrant violations of the

liquor laws can be detected by no other means. The officer or his agent may furnish the defendant in such cases the opportunity to sell, but he does not furnish the defendant the liquor or the intent to sell; and the sale to an officer is not more meritorious or less criminal than if made to some other person. We find nothing in the law or in public policy forbidding the detection of both the offense and the offender in this manner, and we have no criticism to expend upon a public officer who may find it necessary or expedient to adopt this means of discovering infractions of this law."

Moss v. State, 4 Okla. Cr. 247, 111 Pac. 950, 952.

"In People v. Everts, 112 Mich. 194, and People v. Rush, 113 id. 539, it was held no defense in an indictment for an unlawful sale of liquor that it was made to a detective sent by a prosecuting attorney that he might use such purchase and sale as evidence. Indeed, the authorities are numerous, and it would cripple the effective enforcement of the criminal law if it were not permissible to thus procure evidence.

"There are some seeming exceptions, for instance, in larceny, whenever the conduct of the owner amounts to a consent that his property may be taken. The reason is that in larceny it is an indispensable element of the offense that the property shall be taken 'against the will of the owner.' Also, in proceedings for divorce, if the plaintiff secures some one to entice the defendant into illicit acts. The reason is that 'connivance is always a bar to the plaintiff's

cause of action.' Dennis v. Dennis, 57 Am. St. 95. But as to prosecution for offenses, not against individuals, but against the public, like the present, it is no defense that the illegal sale was made to a party who bought not for his own use, but to aid in convicting the seller. It is not the motive of the buyer, but the conduct of the seller, which is to be considered."

State v. Smith, 152 N. C. 798, 799, 800.

"The methods adopted by the policeman to catch the defendant in the act of violating the law have been criticised; but it must be remembered that the ways of 'blockaders' are devious and their trade is generally plied 'underground.' However much the defendant, when caught, may criticise the methods used to catch him, it has been held that the transaction is, so far as the defendant is concerned, a violation of law, if the evidence is deemed by the jury sufficient proof of the facts."

State v. Hopkins, 154 N. C. 622, 624.

"It further appears from the evidence that the prosecuting attorney of Butler county was informed of this arrangement and made no objection thereto. Appellant contends that on this showing the court should have *pro bono publico* dismissed the cases.

"Whatever may be said derogatory to the character of those who, as detectives, spies and informers, entrap the law-breaking class by gaining their confidence and practicing deceit upon them, it has never been ruled that they were incompetent witnesses nor that they might

not tell the truth, nor is there any recognized public policy that condemns their occupation. On the contrary, the keen and shrewd detective is one of the greatest safeguards to urban life and a terror to the thugs and thieves that infest the cities of the country.

"* * * To discover and bring to justice those who subtly, clandestinely and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable, and when nothing more than the truth is elicited and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered."

State v. Lucas, 94 Mo. App. 117, 121.

"Considerable legal hair-splitting has been indulged in by courts and text writers in discussing this subject. It must be admitted at the outset that it is beyond the power of a private person to license the commission of a crime. As to these more serious crimes which are purely transgressions of the public right, it must follow that consent thereto of private persons directly injured thereby cannot, to any extent, purge such crimes of their character as public wrongs, nor render those who committed them less liable to punishment. The consent of a woman upon whom an abortion was performed constitutes no defense to a prosecution therefor. Commonwealth v. Wood, 77 Mass. (11 Gray) 85; Commonwealth v. Snow, 116 Mass. 47. Similarly, consent of the deceased is no defense to a prosecution for homicide. Regina v. Allison, 8 Car. & P. 418. In a prose-

cution for bribery, the fact that the prosecuting witness was the giver of the bribe in question cannot excuse defendant. Newman v. People, 23 Colo. 300, 47 Pac. 278. Nor is the latter exculpated by proof that the bribery was instigated for the purpose of entrapping him. People v. Liphardt, 105 Mich. 80, 62 N. W. 1022; State v. Dodoussat, 47 La. Ann. 977, 17 South. 685.

"The offer to bribe a public official is a transgression of a public right, and the consent or nonconsent of the officer cannot affect the criminality of the act of the person who makes the offer, and even though Mr. Wilson by his words, acts and conduct may have been the inducing cause of the offer to bribe, yet, if appellant did, in fact, tender money to the officer with the intention and for the purpose of influencing his action as such officer, he would be guilty under our statute. It would not be an offense against Mr. Wilson so much as an offense against the public welfare, and one which no officer would have the authority nor power to give his consent to."

Also, the Supreme Court of the United States, in the case of Grimm v. United States, 156 U. S. 604, in sustaining the doctrine as laid down in the above cases, said, in part:

"It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. * * * The official, suspecting that the defendant was engaged in a

business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States. * * *"

See also:

Commonwealth v. Wasson, 42 Pa. Sup. Ct. 38;
People v. Conrad, 92 N. Y. Suppl. 606;
U. S. v. Morgan, 181 Fed. 587;
State v. Abley, 109 Iowa 61, 46 L. R. A. 862;
O'Halloran v. State, 31 Ga. 206;

Counsel state in their brief that no Chinamen were ever brought over, but this is not in accordance with the transcript, as on page 136 of the transcript will be found the testimony of J. K. Wilson, who testified that he was Chief of Police of San Diego, and arrested three Chinamen, each of whom had a slip of paper corresponding to the slips of paper prepared by the defendant, Sam Yick, and introduced in evidence in the Government's case (Tr. pp. 64, 65), and, of course, in that connection it will be remembered that the indictment under which the defendants were convicted is a conspiracy indictment, and that it is immaterial, in a conspiracy case, whether or not the object of the conspiracy was successful.

However, in this connection it is well to call the Court's attention to the fact that Jung Kim told Morse (Tr. p. 58) that he had been to Tia Juana and got the Chinese, but that as he was coming up along the railroad track at night the Chinese got frightened and ran away and he had lost them; and this is also

verified by Mr. Bernard's testimony (Tr. p. 108 *et seq*).

The facts as recited in the transcript and as heretofore stated, clearly show that this case is distinguishable in that regard from the case of Woo Wai vs. United States, for in the case of Woo Wai vs. United States the facts as testified to by the defendant fell short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of Section 5440, and that for the reason that the criminal intention to commit the offense had its origin in the minds of the Government officers, in the Woo Wai case, but in this case it had its origin in the minds of the defendants.

SECOND ASSIGNMENT OF ERROR

The second assignment of error relates to the introduction in evidence by the Government of nine letters taken from the store of the defendant Sam Yick in Bakersfield by the sheriff of Kern County under a writ of attachment and subsequently turned over by the sheriff to Charles E. Kruse, the trustee in the case of In re. Sam Yick, Bankruptcy (Tr. p. 148).

There never was any application made for the return of these letters until on the trial of the case, when the witness Kruse was upon the stand and the letters were offered by the Government, at which time counsel for defendant made a demand for the return of the letters (Tr. p. 150). This application was refused by the trial judge on the ground that the application came too late. In this there was no error, as the case of United States vs. Weeks, 232 U. S. 383,

decided by the Supreme Court of the United States on the 24th of February, 1914, settles the law to be that the trial court in the trial of a criminal case will not stop to consider the manner in which papers have come into the possession of the witnesses, and that in order to secure the return of papers unlawfully seized and taken from a defendant, the defendant must make a seasonable application prior to the trial of the case, for their return. In relying upon the Weeks case, counsel for defendant evidently overlooks the fact that the Weeks case was based upon an application seasonably made; that is, made prior to the time of the trial, for the return of the papers there involved, and if counsel had carefully read the case he would have found that the Supreme Court directly held that in order to be considered, the application must be made prior to the time of the trial.

The Supreme Court said, in the Weeks case, in part, quoting from pages 395 and 396 of the opinion:

> ". . . It was further held, approving in that respect the doctrine laid down in 1 Greenleaf Sec. 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many state cases were cited supporting that doctrine.
>
> "The same point had been ruled in People v. Adams, 176 N. Y. 351, from which decision the case was brought to this court, where it was held that if the papers seized in addition to the policy slips were competent evidence in t he case, as the court held

they were, they were admissable in evidence at the trial, the court saying (p. 358): 'The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of t he manner in which witnesses have passessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence.' This doctrine thus laid down by the New York Court of Appeals and approved by this court, that a court will not, in trying a criminal couse, permit a collateral issue to be raised as to the source of competent testimony, has the sanction of so many state cases that it would be impracticable to cite or refer to them in detail. Many of them are collected in the note to State v. Turner, 136 Am. St. Rep. 129, 135 *et seq.* After citing numerous cases the editor says: 'The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness ahs possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence: People v. Adams, 176 N. Y. 351, 98 Am. St. Rep. 675, 68 N. E. 636, 63 L. R. A. 406. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof.' "

This effectively disposes of the second assignment of error, but it might be said in passing that the application for the return of the papers, if it had been seasonably made, would have been denied by the court for the reason that the papers were not seized by Government officers, but were taken by the sheriff in the exercise of a lawful proceeding. The Supreme Court, in the Weeks case, in the last paragraph of that opinion, among other things, says:

> ". . . As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of a rrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies. Boyd Case, 116 U. S. 616, and see Twining v. New Jersey, 211 U. S. 78."

THIRD ASSIGNMENT OF ERROR

The third assignment of error relates to the same letters involved in the second assignment of error, but is based upon different grounds. This assignment alleges as error the admission of the letters in evidence on the ground that the letters were incompe-

tent, because no connection was shown between the letters and the defendant. It will be remembered that Inspector Morse testified that Sam Yick told him that there were a number of Chinese in Mexico who wanted to come to the United States, and that he, Sam Yick, had letters from these Chinese in Mexico in reference to coming to the United States, and Sam Yick wanted to know if Inspector Morse couldn't prepare papers purporting to show that these Chinese in Mexico were native-born citizens of the United States (Tr. p. 46). This was on May 8, 1911, and was the first mention of Chinese smuggling between the defendant Sam Yick and any of the Government officers. The letters, which are set out in the transcript on pages 174, 177, 179, 182, 184, 185, 187, 188 and 191, show that they deal with matters involved in the indictment, and they were found in the possession of the defendant and, as will hereafter appear, were directed to him. The transcript further shows that the main objection made by defendants' counsel was the fact that the letters were presumably directed to one Jock Coy and that there was no connection shown between Jock Coy and the defendant Sam Yick. It is evident that counsel has failed to carefully read all of the letters or he would find that the letters themselves show that although directed to Jock Coy, they were meant for Sam Yick.

The first letter, in point of time, being U. S. Exhibit 12 L, appears on page 177 of the transcript. It is directed to "Brother Jock Coy" and asks Jock Coy to write a letter of guarantee at once for the writer (Jock Toh, or Deang Jock Toh) in order that the

said writer might be enabled to be smuggled into the United States. The letter further refers to the fact that one "Sam Lin is an experienced man and has been in the smuggling business for the past thirty years."

The second letter in point of time appears on page 174 of the transcript, being U. S. Exhibit 12 J. It is dated April 13, 1911, and is directed to Mr. Deang Coy, and is signed by Quan Ching Lim, and recites the fact that the writer has received a letter from a Chinaman of Ensenada, stating that a countryman desires to come to the United States and that the countryman's name is Deang Jock Toh. The letter also states that the Chinaman Deang Jock Toh has informed the writer that Deang Coy, the addressee, is willing to issue a letter of guarantee for Deang Jock Toh's expenses. This letter, U. S. Exhibit 12 J, is directed to Sam Yick Company. Counsel makes a point of the fact that the transcript would indicate that it was directed to Sam Yick Company, Riverside, but it will be noted that the writer asks Deang Coy, the addressee, to address his reply to P. O. Box 1195, Riverside Calif., and it will therefore easily be seen that Riverside was simply the place where the letter was written, and the letter was really intended for Sam Yick Company, and, as heretofore recited, and admitted by defendant, was found in Sam Yick's possession at Bakersfield.

The third letter in point of time is U. S. Exhibit 12 K, found on page 179 of the transcript. It is also signed Deang Jock Toh, dated April 14, 1911, directed to "Brother Jock Coy," and refers to the fact

that the writer has heard that the immigration officers will make a strict inspection for certificates and asks the addressee, Jock Coy, to be sure and send to the writer the letter of guarantee, evidently referring to the writer of April 7, heretofore quoted.

The next letter in point of time, U. S. Exhibit 12 I, found on page 182 of the transcript, is addressed on the envelope to Deang Jock Coy and refers to smuggling of Chinese.

The next letter in point of time is U. S. Exhibit 12 D, appearing on page 184 of the transcript, dated during the early part of June, 1911, directed to Jock Gim and Jock Coy, asking Jock Gim and Jock Coy to endeavor to get certain other Chinese into the United States.

The next letter in point of time is U. S. Exhibit 12 H, appearing on page 185 and page 186 of the transcript, being another letter from Deang Jock Toh, dated June 13, 1911, and directed to Jock Coy, which further refers to the smuggling of Chinese.

The next letter in point of time is U. S. Exhibit 12 M, appearing on page 187 of the transcript, dated September 2, 1911, being also a letter from Deang Jock Toh to Jock Coy, referring to the smuggling of Chinese; and it so happened that the envelope in which this letter was sent was found with the letter and the address on the envelope was as follows: "Deliver this to Sam Yick Company of Bakersfield" (Tr. p. 188). This letter and envelope show, beyond a doubt, that the name Jock Coy was simply one of many Chinese names under which the defendant Sam Yick went, and shows the Government's contention

that all the letters directed to Jock Coy were intended for Sam Yick, to be correct, and that is the reason thye were found in the defendant's, Sam Yick's, possession.

It also clearly appears from the evidence that the box containing the letters was the personal property of Sam Yick, and that he was cognizant of the contents thereof, inasmuch as the receipt which E. P. Morse gave Sam Yick for the $60 advanced was found in the box (Tr. pp. 148, 149).

This is also true of the next letter, U. S. Exhibit 12 A, appearing on page 188 and page 189 of the transcript, from the same Deang Jock Toh, directed to Jock Coy, also referring to the smuggling business, the address on the envelope being as follows: "Sam Yick Kim Kee Co., Phone Main 113, No. P. O. Box 363, 723 18th Street, Bakersfield, Cal." (Tr. p. 190).

And the last letter, U. S. Exhibit 12 G, appearing on page 191 of the transcript, is also directed to Jock Coy, and refers to the Chinaman Jock Toh and also to the Chinese Ah Sing, Dock Yoke and Shi Jew, the last three being (with some slight variation in spelling) the same Chinese that were brought into the United States in furtherance of the conspiracy. (See Tr. pp. 64, 65.)

It will thus be seen that all the letters related to the smuggling of the Chinese from Mexico into the United States, which was the object of the conspiracy as charged in the indictment. It will further be seen that at least three of the letters were dated in April, 1911, which was prior to the first conversation the de-

fendant Sam Yick had with any Government official about smuggling Chinese, which was on May 8, 1911.

It will further be seen, from an inspection of the letters themselves, that while the body of the letter commences with the words "Brother Jock Coy" or "Deang Coy," they were directed, in many instances, to Sam Yick Company, thus establishing the fact that Jock Coy is a family name or nickname of some kind for Sam Yick, and when it is remembered, as heretofoer stated, and as appears from the transcript, pages 148 *et seq.,* that these letters were found in the possession of the defendant Sam Yick, it will be seen that the ruling of the trial court in holding that the connection between the letters and the defendant was sufficient to justify their admission, was correct. They are material, of course, not only upon the ground upon which they were admitted by the trial court, that is, that they corroborated the Government Inspector's, Morse's, testimony to the effect that Sam Yick told him on May 8, 1911 (Tr. p. 46), that he had certain letters from Chinese friends who wanted to come to this country from Mexico, but also for the purpose of showing that Sim Yick was engaged in the business of smuggling Chinese prior to the first conversation he ever had with a Government officer on the subject, which was onMay 8, 1911; and the objection on the ground of hearsay is answered by the same statement which the defendant Sam Yick made to the inspector, Morse, to the effect that he had letters from friends in Mexico who wanted to come to this country (Tr. p. 46). It will, of course, be borne in mind that the testimony on all of these

matters is uncontradicted and undenied.

In so far as the defendant Jung Kim is concerned, the verdict of the jury shows that the connection of the defendant Jung Kim with the conspiracy at the time of the commission of the overt acts, therein set out, to-wit, on the 8th and 13th days of September, 1911, was established beyond a reasonable doubt, and all of these letters are of dates prior to those dates, and it is, of course, a matter of law so well settled as to not need the citation of authorities, that one conspirator is responsible for everything said or done by another conspirator in furtherance of the object of the conspiracy, while he is still a member of the conspiracy, and for all things said or done by any of the members of the conspiracy in furtherance of the object of the conspiracy prior to the time that he became a party to the conspiracy.

Any party coming into a conspiracy at any state of the proceedings, with knowledge, is regarded as a party to all acts done by any of the other parties before or afterwards, in furtherance of the common design.

United States v. Cassidy, 67 Fed. 698;
United States v. Sacia, 2 Fed. 754;
Thomas v. United States, 156 Fed. 898;
Crawford v. United States, 212 U. S. 183;
Clune v. United States, 159 U. S. 590.

These being the only three errors assigned, and relied upon by counsel for the Plaintiffs in Error, we respectfully submit that the judgment of the trial

court should be affirmed.

ALBEBT SCHOONOVER,
United States Attorney.

ROBERT O'CONNOR,
Assistant United States Attorney.

CLYDE MOODY,
Assistant United States Attorney.
Counsel for Defendants in Error.